Filed 9/30/03 Natural Balance Pet Foods v. Chenango Pet Foods CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NATURAL BALANCE PET FOODS, INC., Plaintiff and Respondent, v. CHENANGO PET FOODS, INC., Defendant and Appellant.	B162239 (Los Angeles County Super. Ct. No. PC027943X)

APPEAL from a judgment of the Superior Court of Los Angeles County, Warren G. Greene, Judge. Modified and affirmed.

Howard, Loveder, Strickroth & Parker and James E. Loveder for Defendant and Appellant.

Zinder & Park and Brian P. Neill for Plaintiff and Respondent.

Chenango Valley Pet Foods, Inc. (Chenango) appeals from judgment in favor of plaintiff Natural Balance Pet Foods, Inc. (Natural Balance) in an action for breach of contract and warranty. The action arose when Chenango supplied Natural Balance with moldy dog food subsequently sold to Natural Balance's customers. Chenango argues that Natural Balance is not entitled to lost profits or expert witness fees because it failed to establish lost profits with reasonable certainty and because the trial court abused its discretion in admitting expert opinion testimony on lost profits. Chenango further argues that Natural Balance is not entitled to prejudgment interest because it failed to make a proper request for such interest.

We find reasonable certainty as to Plaintiff's lost profits and no error in admitting the expert testimony regarding them. We shall affirm that portion of the judgment. However, we find Plaintiff did not satisfy the procedural requirements for prejudgment interest. We therefore shall reverse that portion of the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Natural Balance sells various lines of dry and canned cat food and dog food nationwide. The company contracts with different manufacturers that supply products for distribution under its brand name and label. In early 1998, Natural Balance contracted with Chenango to produce, bag, and label a new product line, Natural Balance Ultra Premium dry dog food, using Natural Balance's formula and packaging materials. Chenango started manufacturing this product line in October 1998 in preparation for Natural Balance's product launch in November 1998. Natural Balance sent product samples to pet food retailers, which led to sales and shipment of the product to U.N.P.P.,[1] an Israeli distributor, starting in early 1999.

In October 1999, Natural Balance started to receive customer complaints regarding mold in their Ultra Premium dry dog food. These complaints persisted and

[1] There is nothing in the record to explain this acronym.

caused Natural Balance to end its arrangement with Chenango in June 2000. Natural Balance was forced to recall and replace the contaminated products. Following discovery of mold in the product in March 2000, U.N.P.P. demanded reimbursement for its sales and marketing costs on the contaminated shipment. Thereafter, the Israeli Department of Agriculture banned importation of Natural Balance products manufactured by Chenango due to the mold problem. In November 2000, U.N.P.P. found an alternate dog food supplier. Before the mold trouble, Natural Balance had been shipping one container of its product to U.N.P.P. every other month; by the time of trial, U.N.P.P.'s replacement supplier was shipping them four to five containers per month.[2]

On July 17, 2001, Natural Balance sued Chenango for mold-related losses, including loss of profits due to cancellation of the U.N.P.P. contract.[3] Chenango filed two motions in limine seeking exclusion of Natural Balance's evidence regarding these lost profits. It challenged the foundation for opinions by Natural Balance's forensic economist, Jennifer Polhemus, as inadmissible speculation and conjecture. Chenango also argued that Polhemus improperly figured net profits in calculating her estimate of lost profits. The trial court denied both these motions.

At trial, Natural Balance presented as witnesses (and Chenango cross-examined) Polhemus, Natural Balance company president Joseph Herrick, and U.N.P.P officer Isaac Mizrahi regarding lost sales and profits. Based partly on sales growth projections given her by Herrick, Polhemus estimated $224,400 in lost profits from loss of trade with Israel for the period August 2000 to July 2002. Chenango offered into evidence Herrick's projections of his company's lost sales to Israel and a document created by Natural Balance that Polhemus used to compute net profits. Later, Chenango moved to strike

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[2] "Container" here denotes a 40-foot-long steel shipping container carried on trucks or ships.

[3] Chenango has acknowledged responsibility for some losses, and only lost profits from Israel are in dispute in the present appeal.

Polhemus' testimony as based on an improper calculation of net profits, recapitulating the argument in the motion in limine. The motion was denied. The jury returned a general verdict in favor of Natural Balance, awarding $281,345.02 in damages. The jury was not asked to determine prejudgment interest or whether damages were liquidated or unliquidated. The trial court entered judgment on the verdict.

After the judgment was entered, Natural Balance filed a memorandum of costs, including $7,143 in expert witness fees pursuant to California Code of Civil Procedure section 998, and $30,293 in prejudgment interest from the date suit was filed pursuant to California Civil Code section 3287. Thereafter, Chenango moved for a new trial and for judgment notwithstanding the verdict, recapitulating its arguments in the earlier motions in limine. Chenango also filed a motion to tax costs, challenging Natural Balance's claim to expert witness fees and prejudgment interest. The trial court denied all three of Chenango's motions and awarded Natural Balance expert witness fees and prejudgment interest from the initial filing of suit. Chenango filed a timely appeal.

DISCUSSION

I

Chenango argues there is no substantial evidence to support Natural Balance's award of $224,400 in lost profits due to its loss of Israeli commerce. "'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651, quoting *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Ibid*.) Substantial evidence is "not merely an appellate incantation designed to conjure up an affirmance," and the appellate court must consider the trial court record as a whole in finding substantial evidence. (*Roddenberry*, at p. 652.) However, the appellate court must consider the evidence "in the light most favorable to the prevailing party" and

"indulging in all legitimate and reasonable inferences . . . to uphold the jury verdict if possible." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.)

A

Chenango claims the trial court abused its discretion by admitting speculative, conjectural expert opinion testimony wholly lacking foundation and insufficient to constitute substantial evidence.

Expert opinion testimony must be based on matter "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, . . ." (Evid. Code, § 801, subd. (b).) "Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

Trial courts have broad discretion regarding foundation for expert testimony. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) Nevertheless, trial judges must limit expert testimony to the witness's area of expertise and must require adequate foundation for opinions offered. (*Ibid*.) Trial courts may properly allow otherwise inadmissible evidence as foundation for expert opinions so long as the threshold requirement of reliability is met. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) But courts should weigh factors of necessity and relative reliability against risk of speculative or conjectural foundation. (*Korsak,* at pp. 1524-1525.)

Chenango argues that Natural Balance's expert, Jennifer Polhemus, improperly based her estimate of lost profits on unreliable speculative projections of sales growth from Israel by Natural Balance president Joseph Herrick, a layman. Chenango assumes that because Herrick was not qualified as an expert and is the plaintiff's president, his projections are inherently unreliable. It also suggests Polhemus should have undertaken independent research regarding the pet food market in Israel and Natural Balance's opportunities to participate in it.

We do not agree. A top company official is an obvious and reasonably reliable source for an expert seeking information regarding that company's lost sales and lost profits, since such persons are likely to have personal knowledge of relevant information that may not be available elsewhere. Nor must experts reach opinions only on the basis of independent investigations. (See *Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1251-1253 [expert's testimony regarding cause of automobile accident not "wild speculation" or inadmissible due to lack of scientific testing, product disassembly, or independent investigation].)

Sources for expert opinions may be incomplete or biased, but opponents are free to expose such flaws by cross-examination and by introduction of their own evidence, including expert opinion testimony. Such imperfections do not make the sources inherently unreliable or purely speculative. So long as the basic threshold requirement of foundational reliability is met, the strength of an expert's assumptions affects the weight rather than the admissibility of his opinion. (*Schreidel v. American Honda Motor Co.*, *supra*, 34 Cal.App.4th at p. 1253.) Opposing counsel are free to demonstrate that an expert's opinions are worth no more than the reasons and factual data upon which they are based. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607.)

Chenango objected to Herrick's lost-profit projections only as speculative and lacking foundation. At trial, Natural Balance offered testimony by Herrick and U.N.P.P. official Isaac Mizrahi that supports Herrick's projections, based on Natural Balance's shipments to Israel prior to the Israeli import ban and the subsequent demonstrated sales growth record in Israel of the firm that replaced Natural Balance. Chenango had a full and fair opportunity to cross-examine the Natural Balance and U.N.P.P. witnesses as well as Polhemus regarding this foundational matter. It also chose not to call an expert witness to dispute Polhemus' claims. Instead, Chenango itself put the projections into evidence. Because Herrick's projections were the sort of matter upon which an expert witness may reasonably rely, and because Chenango had full opportunity to cross-examine both foundational witnesses and the expert using the foundation, we find no abuse of discretion in the trial court's admission of Polhemus' expert opinion testimony.

Chenango also argues that Polhemus admitted to testifying outside her expertise. This claim is based on statements taken out of context, in which Polhemus noted that she claimed no expertise regarding the history or details of Natural Balance's relationship with Israel or its Israeli distributor and was not familiar with all the evidence presented at the trial. Only a high-ranking company official of Natural Balance or U.N.P.P. would likely have such expertise. Polhemus' general expertise as a forensic economist was not impaired.

B

Chenango argues that Natural Balance's claims for lost profits are not reasonably certain, as required by law.

Lost prospective profits may be recovered only if evidence shows their occurrence and extent with reasonable certainty. (*S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536.) The plaintiff bears the burden of producing "the best evidence available in the circumstances" to show lost profits, but need only demonstrate a "reasonable probability that profits would have been earned except for the defendant's conduct." (*S.C. Anderson, Inc. v. Bank of America, supra*, 24 Cal.App.4th at p. 536.) It is a given that a determination of what would have happened but for a defendant's conduct must, to some extent, be based on estimates, but a "'wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute.' [Citation.]" (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 908, quoting *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143.)

The California Supreme Court distinguishes between established businesses and unestablished businesses in the showing required for reasonable certainty as to lost profits. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 882-883 (*Kids' Universe*).) Damages for loss of prospective profits due to interference with operation of an established business by breach of contract are generally recoverable because their "occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales." (*Kids' Universe*, at p. 883.) Once the extent and occurrence of lost profits for an established

business are shown with reasonable certainty, a plaintiff will recover even if "the amount cannot be shown with mathematical precision." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698 (*Resort Video*).) Lost profits of unestablished businesses, without a track record, are typically more "uncertain, contingent and speculative" than those of established businesses, but such new or prospective operations may also receive lost profit damages where these can be shown by "evidence of reasonable reliability." (*Kids' Universe*, *supra*, 95 Cal.App.4th at p. 883.)

Chenango argues that Natural Balance failed to show reasonable certainty and offered only speculation as to lost anticipated profits because it did not offer evidence of its own overall operating history or "specific economic or financial data, market surveys or analysis based upon business records or operating histories of similar enterprises," as called for in *Kids' Universe* and *Resort Video*. But these cases concern standards of proof for unestablished businesses that do not apply to established businesses. Chenango accepts that Natural Balance was an established business at the time of the contract breach, but still faults Natural Balance for not offering evidence of its overall operating history. It argues that for a business to claim lost profits, it must be able to show overall profitability. This would mean that no company operating at an overall loss could ever claim lost profits as to a particular profitable undertaking. The law does not set any such overall profitability standard for lost profits claims, but instead looks to particular undertakings and transactions. (*S.C. Anderson, Inc. v. Bank of America*, *supra*, 24 Cal.App.4th at p. 535 ["undertaking"]; *Kids' Universe, supra*, 95 Cal.App.4th at p. 884, quoting Rest.2d Torts, § 912, com. d, p. 483 ["'business or transaction'"].)

Regarding lost profits from sales to Israel, Natural Balance, an established business, had no obligation to provide evidence of its overall operating history or to show overall profitability. It only had to demonstrate reasonable probability as to the occurrence and extent of profits that it would have earned from its operations in Israel but for Chenango's conduct. Natural Balance did this through the testimony of Herrick, Mizrahi, and Polhemus, along with Herrick's Israeli sales projections and Natural

Balance's figures regarding the profitability of its Israeli transactions, which are exhibits it prepared but which Chenango put into evidence.

Unlike the plaintiff in *Resort Video* whom the court faulted for not offering expert testimony or providing evidence as to the profitability of the particular venture in question, Natural Balance supplied both as to its aborted Israeli operations. Also unlike the plaintiff in *Resort Video*, who sought to claim lost profits for an unestablished business and failed to introduce any evidence of operating histories of comparable businesses, Natural Balance, an established company, offered evidence regarding the relevant operating history -- Israeli sales and shipments -- of the company that developed the Israeli business relationship Natural Balance had lost. Indeed, if anything, Natural Balance's estimate of lost sales as of July 2002 (three containers per month) was more conservative than the demonstrated record of the replacement company (four to five containers per month), which mitigates the risk of speculation and conjecture. Finally, Chenango offered no expert opinion testimony to challenge Natural Balance's expert. Natural Balance's evidence thus shows reasonable certainty and probability as to lost profits from Israel.

C

Chenango argues that Natural Balance failed to properly calculate net profits in claiming lost profits.

Damages for loss of anticipated profits are measured by net profits, not gross profits. (*Resort Video*, *supra*, 35 Cal.App.4th at p. 1699.) Net profits are the gains made from sales after deducting the cost of labor, materials, rents, interest, and other expenses. (*Ibid*.)

Chenango claims that Polhemus did not subtract costs for labor, rents, interest, and similar expenses of business operation from her lost profits estimate, but deducted only the costs of dog food, bags, pallets, and shipping. However, Polhemus explained at trial that Natural Balance's costs for labor, buildings, and equipment would be the same with or without the Israeli trade -- the company's existing workforce and facilities could have handled the additional commerce without increased overhead costs except for materials,

packaging, and shipping. By her calculations, there were no other costs to deduct from the lost profits estimate.

In sum, we find that Natural Balance's award of lost profits is supported by substantial evidence. The trial court did not abuse its discretion in admitting Polhemus' expert opinion testimony; Natural Balance showed reasonable certainty as to its lost profits; and it offered an acceptable justification for its calculation of net profits.

II

In its appeal, Chenango argues that the trial court erred in awarding prejudgment interest on the damage award.

Civil Code section 3287 allows recovery of prejudgment interest on damages. Subdivision (a) of that statute governs cases involving liquidated damages and requires a court to "award prejudgment interest upon request, from the first day there exists both a breach and a liquidated claim." (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828 (*North Oakland*).) Section 3287, subdivision (b) concerns unliquidated contract damages claims and gives trial judges discretion to award prejudgment interest from the filing of suit or a later date.[4] (*Id*. at pp. 828-829.) "A general prayer in the complaint is adequate to support an award of prejudgment interest," but a timely specific request that the court exercise its discretion to grant prejudgment interest is required where a plaintiff is awarded damages but "no interest was included in the verdict and . . . neither court nor jury had determined whether the damages were liquidated or unliquidated." (*Id*. at p. 829.) Because prejudgment interest is an element of damages, not a cost, a postjudgment cost bill is not an appropriate vehicle to request prejudgment interest under section 3287. (*Id*. at p. 830.) Rather, a plaintiff must request prejudgment interest under section 3287 "by way of motion prior to entry of judgment"

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[4] Civil Code section 3287, subdivision (b) reads: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed."

or by "motion for new trial no later than the time allowed for filing such a motion." (*Id*. at p. 831.) This procedure is designed to protect a defendant's right to receive notice of liability for prejudgment interest and an opportunity to be heard on the issue. (See *Steiny & Co. v. California Electric Supply Co*. (2000) 79 Cal.App.4th 285, 294 (*Steiny*).)

In the present case, the court and jury did not determine whether damages were liquidated or not, and the general verdict made no mention of either sort of damages. Because the damages were unliquidated, judicial award of prejudgment interest is not mandatory, and a general prayer for relief is insufficient to set judicial discretion in motion. Rather, Natural Balance was required to make a specific request for prejudgment interest either before entry of judgment or in the form of a motion for a new trial. (*North Oakland*, *supra*, 65 Cal.App.4th at p. 831). It did neither. Instead, Natural Balance made its specific request only after entry of judgment through a cost bill, a procedure disapproved in *North Oakland*. (*Ibid*.) Also, unlike the facts in *Steiny*, here there was no stipulation to postjudgment adjudication of a request for interest. (*Steiny*, *supra*, 79 Cal.App.4th at pp. 290, 294.) Natural Balance's draft of a proposed judgment including interest, followed by submission of a proposed judgment that deleted any reference to interest, does not provide adequate notice to a defendant under *North Oakland* and *Steiny*. Thus, the trial court's grant of prejudgment interest to Natural Balance was improper.

III

Chenango also argues that Natural Balance is not entitled to its expert witness fees because Natural Balance's damages are less than its statutory offer of $200,000 pursuant to Code of Civil Procedure section 998. This argument is predicated upon our acceptance of Chenango's arguments that Polhemus' expert testimony lacked foundation and that there was no reasonable certainty as to lost profits. Because we have declined to accept either argument, Natural Balance's damages remain higher than the statutory offer, and Natural Balance is entitled to expert witness fees. We also note that section 998 is designed to penalize litigants who *reject* settlement offers shown to be reasonable by subsequent damage awards. (*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 330.) Here, Natural Balance *made* the settlement offer in

question and should not be penalized for Chenango's rejection of its offer pursuant to section 998. We find the trial court properly awarded expert witness fees to Natural Balance.

DISPOSITION

The judgment is modified by deleting $30,293 in prejudgment interest awarded to Natural Balance. In all other respects, the judgment is affirmed. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.